United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be submitted by
RONALD RUBINSTEIN

76-1095

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

FABIO CAPECE,

Defendant-Appellant.

BRIEF FOR APPELLANT

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UNITED STATES OF AMERICA,

Appellee,

-against-

FABIO CAPECE,

Appellant.

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PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered on the 21st day of November, 1976, sentencing appellant to three years in prison and three years of special parole, on his conviction by a jury in the United States District Court for the Southern District of New York (Pierce, J.) of conspiracy to distribute and possess with the intent to distribute marijuana. Appellant, although jointly indicted with Salina Scarancella, was tried before a jury alone.

STATEMENT OF ISSUES

1. Must a foundation be laid that declarations were made in the course of and in furtherance of an existing conspiracy to be admissible as an exception to the rule against hearsay?

2. Is an accused denied a fair trial where his right to qualify, explain, limit or contradict government evidence is unduly hampered?

3. Does misleading and unfair argument in summation by a prosecutor deprive an accused of a fair trial?

PRE-TRIAL PROCEEDINGS

The Court suppressed the contents of a foot locker based upon its decision in the case of United States v. Meinecke, an alleged co-conspirator. (9A*) The Court denied a hearing on his application to suppress the evidence seized on search of three suitcases, on grounds that the papers submitted by appellant did not contain sufficient facts to warrant a hearing and based on the denial of the motion to suppress evidence found in the suitcases, following the hearing held in United States v. Meinecke, 73 Cr. 164. (10A) Counsel for appellant argued that since a hearing had been granted Meinecke, it should have been granted appellant, who should not have been bound by a decision in a proceeding, in which he was not a participant, nor represented by counsel. The Court denied the motion. (11A)

STATEMENT OF FACTS

Roberta Dilts was the initial witness to testify for the prosecution. (T. 33**) She testified that she was twenty three years of age,

*Pages followed by "A" are from the appendix.
**Pages preceded by "T" are from the trial record.

resides in California and is in the sign business. However, she grew up in New York City, having gone to California in January of 1971, where she met Michael Browne. (T. 34) She saw him frequently. She also knew Salina Scarangela in California, who came from New York City. She lived in the latter's house, in Dana Point, California and was an addict. She stayed there from May or June to August 29th, 1972, when she went to a rehabilitation center for addicts. She saw appellant in California. (T. 36)

She knew appellant from California and saw him there in August of 1972, before leaving Miss Scarangela's house. She also knew William Meinecke, a friend of appellant's. (T. 37)

She knew Meinecke, Scarangelo and appellant as friends in New York. She is a heroin addict. She recalls events but was under the influence of drugs being going into Synanon. (T. 38-9)

On cross-examination, she testified that she learned appellant was in California, the second week in August of 1972. (T. 41) She testified that she was involved in drug transactions with Michael Browne, but the Court struck the testimony out. (T. 45)

Browne and his girl friend lived with her. (T. 46) Appellant helped take her to Synanon. (T. 48)

The next witness was Michael Browne, age 23, a California resident and machinist. In the summer of 1972, he met Salina Scarangela.

(T. 49) Roberta Dilts brought her to his house. He had met Roberta and her boyfriend, when they picked him up hitchhiking. He testified that, "They told me they had a friend coming out to California in the near future to buy some marijuana and they asked me if I would be interested in working for them." (T. 50) He answered affirmatively. This conversation was with Roberta Dilts and Salina Scarangela. Defense counsel duly objected to it as hearsay, but the Court received it, subject to connection. They stayed at his house that night and thereafter at their own house in Dana Point. (T. 51)

There came a time when they told him the friend was coming. (T. 52) He called and Roberta Dilts told him their friend had arrived and he and his wife should come there, which testimony was objected to as hearsay, but received by the Court subject to connection. (T. 53)

The witness and his wife went to the house of Roberta and Salina. Salina was no longer there. Roberta introduced him to appellant and Meinecke. (T. 54)

Appellant said he was in California to buy marijuana. The witness's role would be to transport the marijuana, for which he would be paid two hundred dollars. (T. 55-6) This meeting took place the latter part of August. (T. 57) At the end of the month, the witness, together with his wife, moved in with appellant, his wife and children, since Roberta Dilts had entered Synanon. (T. 58) Bill Meinecke also lived

there. (T. 59)

Mary Capece and the children then returned to New York. (T. 60)

Appellant and Bi. Meinecke went to San Diego on September 5th. Appellant telephoned the witness to tell him they were ready to proceed, having found marijuana. (T. 61) Appellant called him the next day, September 6th, to tell him to meet them at Denny's Restaurant in Ocean Beach. (T. 62)

The witness and his wife went there in their car. Appellant told him they needed another suitcase and gave him approximately one hundred dollars to buy it. Appellant had approximately $17,000. (T. 63) He never observed large sums on Meinecke. He bought the suitcase, returned with it, which was taken by appellant and Meinecke and they placed it in a rented car, in which the marijuana was kept. (T. 64)

Appellant and Meinecke did not tell him where they were going, but later returned. (T. 65) Mary Capece and Billy Meinecke drove the car. (T. 66)

Billy Meinecke gave him the car keys. He got into the rented car and drove to the San Diego train station, while they followed him. (T. 67)

The witness took three suitcases from the trunk of his car and loaded them onto a luggage area in the railroad station. He helped weigh the luggage. (T. 67) He bought a ticket to New York City, using the name, Peter Beck. (T. 68) He did not see appellant there. He paid

between $155 and $180 for the ticket. He got the money from appellant. (T. 69-70)

Having completed his business, he left in the rented car. They followed him in his Volkswagen. He got out of the rented car, gave appellant the railroad tickets, baggage receipts and the keys to his car. (T. 70) He was to follow them, to take back the rented car and drop it off near the Los Angeles airport. Appellant gave him between two hundred and two hundred fifty dollars. (T. 71) They drove in his Volkswagen to the Los Angeles airport. (T. 72)

He loaded three suitcases to be transported, two yellow and one, green. The latter was the one he bought. (T. 82)

He was arrested May 16th, 1973. He pleaded guilty to conspiracy to possess and distribute marijuana. He was sentenced by Judge Pierce to two years' probation. He is no longer on probation. No promises had been made to him. (T. 84-5) However, he did make an agreement with the Government to plead guilty and to cooperate. (T. 85-6)

He admitted that on a previous trial, he testified falsely that it was Salina Scarangela he had met hitchhiking, not Roberta Dilts. (T. 86) He was permitted to explain that he had testified falsely to keep Roberta Dilts' name out of the case. At the previous trial, he testified falsely when he said he did not know the name Roberta Dilts. (T. 92)

On cross-examination, Michael Browne testified that before the

Grand Jury on June 29, 1973, he testified he met Salina Scarangela in August of 1972 in California. (T. 98) Assistant United States Attorney Bannigan sent for him and said that it would be made known to the Court, if he cooperated. (T. 103-4) He admitted testifying falsely before the Grand Jury that he met Salina Scarangela and another woman (not Roberta Dilts), when they picked him up hitchhiking. (T. 106-9) He claimed he so testified falsely to protect Roberta Dilts, the one who introduced him to appellant. (T. 111) He claimed to have done this out of affection. (T. 112) The Court restricted cross-examination of appellant's counsel by refusing to allow him to examine Browne regarding his having stolen property from the apartment of Roberta Dilts. (T. 115) He admitted that he knew appellant had $17,000 from hearsay. (T. 119) Browne testified that his prior false testimony was calculated to protect both Roberta Dilts and himself, but the Court refused to allow defense counsel to develop that what he wanted to conceal was their prior joint narcotics transactions. (T. 133)

On redirect examination, Browne testified that appellant told him he had $17,000 to buy marijuana (T. 136) and he saw appellant with an inch or inch and a half of bills, but did not count the exact amount. (T. 137)

The third prosecution witness was Ronald R. Dunbar, a supervisor with the Amtrak Railroad. (T. 147) He testified that he was on duty

September 6th, 1972. Michael Browne came in with two heavy suitcases. He then went back for a third. White powder was oozing from them. He jotted down the license plate number of the car Browne drove, a Plymouth. (T.148-9)

Browne paid for a one way ticket to New York City and checked the baggage. (T.150) The baggage check reflected a trip from San Diego to New York City. (T.157-8) Over objection, he testified that he telephoned the Drug Enforcement Administration p.rsonnel that his suspicions had been aroused. An agent named McCravey responded to his call. (T.159-160) A second agent arrived and they put the bags in a car and took them away. (T.161)

On cross-examination, he admitted he could not identify anyone in the waiting car outside. (T.162-3)

Nicholas Goutanis, in the car rental business, was the Government's fourth witness. (T.169) He testified that a woman identifying herself as Mary Capece rented a car on August 16th, 1972. He described her as short and plump and identified the car rental agreement. (T.170-3) The rental term was through August 23rd, 1976, but she did not return it on that day. Instead, she posted additional security. (T.176) Ultimately, the car was returned on September 6th, (T.177) It was returned by a man whom the witness could not identify. (T.178)

One month before this rental transaction, the woman identifying

herself as Mary Capece had rented a different car. Objection was sustained to the testimony that a man was with her, who identified himself as Mr. Capece, but the jury heard the answer. (T. 178-9)

On cross-examination, the witness testified that the "Mr. Capece" could "have been her brother." The witness conceded that "it could have been anyone, I guess." (T. 181) However, the witness did say, "My husband doesn't have a driver's license." (T. 181) Michael Browne was with the people who returned the car. (T. 184)

The fifth witness, Ed McCravy, is a Special Agent with the Drug Enforcement Administration. (T. 189-190) On September 6th, 1972, he responded to the Santa Fe Railroad Terminal of the Amtrak Station in San Diego. Ronald Dumbar took him to a room where he found two gold and one green suitcases. (T. 191) There were traces of talcum powder and the odor of marijuana. (T. 192) Ultimately, he opened the bags and found marijuana in them. (T. 197, 207) They contained 21, 28 and 27 packages respectively. (T. 208-9) He returned the suitcases to the Amtrak Station and directed that they be shipped as intended. (T. 213)

Agent McCravy testified that concrete blocks were put in the suitcases. Some of the marijuana was destroyed. Some was sent to the laboratory in San Francisco by Registered Mail for analysis. (T. 213-6)

On cross-examination, he testified that Browne was arrested in California. (T. 226)

The sixth Government witness, Patrick Cullen McGregory,

a Special Agent with the Drug Enforcement Agency, was on duty on September 6th, 1972, when he received a telephone call. (T. 234) He proceeded to the Railroad Station where he met Agent McCravy. McCravy had three suitcases. On the sides was talcum powder. He smelled one. He detected the odor of marijuana. (T. 235) He reached the station between 3:30 and 3:45 P.M. He went to the United States Attorney's office, procured a search warrant and returned to the train station. He opened a suitcase, observed plastic bags inside and then took the suitcases to the San Diego office. (T. 236) He locked the suitcases in their evidence room. (T. 237)

Michael A. Peterson, now in the construction business, but formerly employed by the Bureau of Narcotics & Dangerous Drugs, was the seventh Government witness. (T. 247-8) On September 10th, 1972, he received a phone call and proceeded to the Pennsylvania Railroad Station in New York City. (T. 249) There, he met Special Agents Tom Smith and Mike Gray. They posed as baggage handlers. William Meinecke presented a clerk with several claim checks. The clerk, in turn, gave the checks to the witness. He handed Meinecke the luggage and then, together with Agent Gray, placed him under arrest. (T. 250) They took the suitcases back to the New York City office. (T. 254) Each contained a one kilo brick of marijuana. (T. 256) There were construction bricks in each for weight. (T. 257)

The eighth Government witness was Thomas William Smith, a Special Agent, with the Drug Enforcement agency. On September 10th, 1972, he was on duty in New York City. (T. 276-7) He was in the Pennsylvania Station, awaiting arrival of a train and luggage. Agents Peterson and Gray were with him. (T. 278) William Meinecke picked up the luggage and was arrested. (T. 279) They removed marijuana bricks and delivered them to the chemist at 90 Church Street. (T. 280) Meinecke was searched. Documents were seized and offered in evidence. (T. 282-3) They included documents showing Meinecke was recently in California. (T. 284) There was an address book with Mrs. Capece's name and address in it. (T. 285) The documents were allowed in evidence, over objection, as notations made by Meinecke prior to arrest in the course of a conspiracy. (T. 287)

Robert L. Countryman, the ninth Government witness, is a forensic chemist for the Drug Enforcement Administration. (T. 304) He did an analysis on the bricks he received by Registered Mail and found them to be marijuana. (T. 312) They weighed 44.3 pounds. (T. 313)

Dennis Walczewski, a chemist, was the tenth Government witness. (T. 317) He testified that tests established the substance analyzed in New York to be 2.2 pounds of marijuana. (T. 322-3)

The defense stipulated to commence its case before the Government rested. The first defense witness was Special Agent Ed McCravy (T. 328), who testified that Michael Browne was looking for a deal to

testify. (T. 336-7)

Assistant United States Attorney Frederick Davis announced that the Government does not intend to call William Meinecke as a witness because he had steadfastly refused to talk to him and finally, when Meinecke relented and agreed to talk to him, Mr. Davis stated to the Court that it was his opinion that what Mr. Meinecke would testify to was not the truth. (T. 345) Specifically, Mr. Davis testified that Mr. Meinecke stated that, if called to testify, he would exculpate appellant. Mr. Davis therefore rested the Government's case. (T. 346)

Defense counsel moved to dismiss the Government's case for failing to make out a prima facie showing of guilt. The motion was denied. (T. 347-8)

Defense counsel made an offer to prove that Browne had lied previously, not to protect Roberta Dilts as he explained in this trial, but to conceal his prior trafficking in marijuana and L.S.D. (T. 349) However, the Court denied the defense application to present such evidence. (T. 353)

The second defense witness was Roberta Dilts. (T. 356) She testified that she met appellant, his wife and their children. His wife, Mary, leased a car so that the family could see Disneyland, the Zoo and other sights that draw tourists. (T. 357-8) In August of 1972, she lived in their house. Appellant never discussed marijuana, but Mike Browne boasted he could get it. (T. 358-9) Appellant never drove the car. (T. 360)

Browne has a reputation for being sneaky, being a liar and causing people trouble. (T. 362) The Court sustained objection to defense interrogation of Roberta Dilts concerning the luggage. (T. 370-1)

On summation, Assistant United States Attorney Davis argued that Browne has no motive to testify falsely since he had already been sentenced. (T. 400-1) He further agrued that witnesses other than Browne had inculpated appellant. (T. 404-5)

POINT ONE

HEARSAY DECLARATIONS RECEIVED INTO EVIDENCE WITHOUT ANY FOUNDATION THAT THEY WERE CONSPIRATORIAL STATEMENTS MADE IN THE COURSE OF THE CONSPIRACY CHARGED, DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The indictment charges that on the 1st day of September, 1972, appellant, defendant Salina Scarancella and co-conspirators William W. Meinecke and Michael Browne conspired to distribute and possess, with intent to distribute, marijuana. The overt acts in furtherance of the conspiracy were alleged to have been committed on September 6th, 1972 when Michael Browne shipped it from the Santa Fe Railroad Depot in San Diego and September 10th, 1972, when William Meinecke attempted to pick it up at the Pennsylvania Station in New York City (only to be intercepted by his arrest.)

Michael Browne, a witness for the Government, testified that in the summer of 1972 and prior to his alleged meeting with appellant, Roberta Dilts and Salina Scarangela told him "they had a friend coming out to California in the near future to buy some marijuana and they asked me if I would be interested in working for them." Counsel for appellant duly objected to this testimony on grounds that it was hearsay. The objection was overruled, subject to connection. (15A-16A)

The declaration of a co-conspirator made in the course of a conspiracy is admissible in evidence, as an exception to the rule against hearsay, provided that a proper foundation is laid. The Court must make findings that the conspiracy was in existence at the time the declaration was made. Absent such finding, the receipt in evidence of such hearsay declaration, is error. Nor in this case can it be justified as a declaration as to the state of mind of the declarant - Michael Browne - since its use as such would be entirely too prejudicial. United States v. Kaplan, 510 F. 2d 606 (2nd Circ., 1974).

No proper foundation was laid for the introduction into evidence of the declaration by Browne. The trial testimony reflects that Roberta Dilts was not a member of the alleged conspiracy. Nor was any independent evidence offered that Salina Scarancella was a member. Browne testified that it was Roberta Dilts, not Salina Sarancella, who introduced him to appellant and William Meinecke. Indeed, Browne affirmatively

testified that Sanancella was not even present at the time of the introduction. Nor is any other conspiratorial role assigned to her. (17A-19A) Therefore, it is doubtful that the prosecution laid the proper foundation to admit into evidence the hearsay declarations, allegedly spoken by Dilts and Sarancella, by reason of its failure to prove them by independent evidence to be members of the conspiracy.

However, there is a more persuasive reason that the receipt in evidence of this testimony was error. At the time the declarations were made, the alleged conspiracy had not yet matured. The alleged conspiracy did not begin until Michael Browne later met appellant and Meinecke.

In Carbo v. United States, 314 F.2d 718 (9th Circ., 1963), the Court delineated the foundation that must be laid to introduce into evidence co-conspirator declarations, as an exception to the rule against hearsay: "Declarations of one co-conspirator in furtherance of the objects of the conspiracy, made to a third party are admissible against his co-conspirators where the Court finds, as a matter of law, as follows: (1) the declaration is in furtherance of the conspiracy, (2) that it was made during pendancy of the conspiracy and (3) there is independent proof of existence of the conspiracy and the connection of declarant and defendant with it. As set forth in United States v. Kaplan, 510 F.2d 606 (2nd Circ., 1974), supra, to be admissible, the declaration must have been uttered following the creation of the alleged conspiracy. It is this additional test that is failed in the case at bar, since the declaration attributed to Dilts

and Scarancella were uttered prior to the birth of the alleged Conspiracy.

"The trial judge was required . . . before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of non-hearsay evidence that the latter was a party to the conspiracy . . . We must adhere to the standing rule which requires us to exclude hearsay where the threshhold test was not made. United States v. Cirillo, 499 F.2d 872 (2nd Circ., 1974).

The record reveals a second instance of the admission into evidence of hearsay, under the erroneous theory that they were conspiratorial declarations. When William Meinecke was arrested, a search of his person produced an address book with Mrs. Capece's name and address in it. It was allowed in evidence, over objection, as notations made by Meinecke prior to arrest in the course of a conspiracy. (44A, 45A) Under the principles above enumerated, a proper foundation was not laid for the introduction of this testimony. The alleged declaration by Meinecke was not shown to be conspiratorial, since no independent proof had been offered that Mrs. Capece had been a member of any conspiracy. Moreover there was no proof that Meinecke had made the writing after the birth of the conspiracy, as opposed to prior thereto. The evidence was neutral as to the time the notation had been made. Such state of balance is insufficient as a proper foundation to establish that the writing was made

during the course of the conspiracy, as opposed to before. This second alleged conspiratorial declaration should have been excluded.

Thus, there was double error in admitting crucial matter into evidence, that did not qualify and for which a proper foundation had not been made. Such error cannot be classified as harmless in the case at bar, where the only witness against appellant was Michael Browne, an alleged co-conspirator, who, personally, despatched the marijuana from San Diego to New York and who pleaded guilty and received probation, undoubtedly for his cooperation. Since the only evidence against appellant came from his alleged co-conspirator, who had decided to cast his lot with the prosecutorial team, any prejudicial evidence would have a tendency to disturb the evidentiary balance in the case at bar.

POINT TWO

UNDULY RESTRICTING DIRECT AND CROSS-EXAMINATION BY DENYING APPELLANT THE RIGHT TO QUALIFY, EXPLAIN, LIMIT OR CONTRADICT THE EVIDENCE OFFERED BY THE GOVERNMENT, DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The prosecution unfairly used Roberta Dilts as a witness to inflame the jury and thereby prejudice appellant. She testified that she was a Heroin addict, and was acquainted with Michael Browne, William Meinecke and appellant, which testimony had no other purpose than to

inflame the jury into believing appellant had a propensity to deal in narcotics. (12A-13A) However, on cross-examination, the Court sustained the Government's objection to development of the fact that the witness and Michael Browne, the Government's witness, had dealt extensively in narcotic traffic. Michael Browne, as herein set forth, was the only witness to implicate appellant in the distribution of marijuana. (19A-37A)

The limitation on cross-examination frustrated the strategy of the defense to show that Michael Browne had arranged to send the marijuana on his own account and that appellant was not involved in the conspiracy.

Browne admitted that he had lied before the Grand Jury when he testified that it was not Roberta Dilts that had picked him up hitchhiking in California. (40A-41A) He testified that he lied to protect Roberta Dilts and his motive was affection. (42A)

The Court unduly hampered the defense by refusing to allow Browne to be cross-examined to establish that he had stolen property from the apartment of Roberta Dilts, to show that he did not feel affection for her, but that there was more sinister motivation for his perjury before the Grand Jury. (43A) The defense strategy was to show that Browne's motive to lie was to conceal his extensive dealings in narcotic movement with Roberta Dilts, to raise a reasonable doubt that appellant was the power behind the conspiracy at bar. Defense counsel offered to prove

that Browne had lied previously, not to protect Roberta Dilts as he explained on this trial, but to conceal his prior trafficking without appellant, but with Roberta Dilts, in marijuana and L.S.D.. The Court refused to allow Roberta Dilts to testify to her joint ventures with Browne in the narcotics trade, testimony that Roberta Dilts was willing to give. (48A)

The defense was not trying to prove that Browne had a propensity to commit the crime charged. This was not necessary, since he admitted his participation. What the defense was seeking to establish was that he was the brains behind the narcotic trafficking, not appellant, by showing his extensive dealings in narcotics. This the Court absolutely refused to allow appellant to do. (49A)

'A defendant has two ways to combat a case, to contradict the Government witness and to impeach them.' These labors may not be "unduly curtailed." Salgado v. United States, 278 F. 2d 830 (1st Circ., 1960). "The principal of verbal completeness prescribes that the defendant may bring out on cross-examination that testimony which might qualify, explain, limit or contradict the portion offered by the Government on direct examination." United States v. McCorkle, 511 F. 2d 477 (7th Circ., 1974) The explanations of Browne were taken at face value, while appellant was denied the right to 'explain" them to be false. It was the Government that opened the door to the alleged reasons for Browne's false testimony before the Grand Jury and his claimed relationship with

the other members of the cast in this action. However, when the defense attempted to establish that Browne's explanations were false and sinister, that Browne, a seasoned narcotics pusher, was the one behind the illegal trafficking and that Browne's explanations for prior false testimony were a mere cover-up for his personal involvement, the Court below slammed the door shut on counsel's efforts to establish the defense facts for the jury. This constitutes a denial of the Constitutional right to cross-examination.

Where a witness testifies "to some facts" it is "proper for him to be cross-examined as to other relevant and material facts on the same issue." Moore v. United States, 217 F. Supp. 289, E.D. Pa., 1963, aff'd, 332 F. 2d 372 (3rd Circ., 1963). Thus, it is proper to interrogate an alibi witness on robberies in which an accused was involved, to establish that the alibi does not rule out that he nevertheless had time to leave the apartment and commit the crime charged. Hood v. United States, 365 F. 2d 949 (D.C., 1966)

It is not the role of the Court to assure victory for one side or the other, but to assure the person charged a fair trial. In the case at bar, the defense had a right to have the jury know that Michael Browne had lied to a Grand Jury, not because of his affection for Roberta Dilts, from whom he had stolen, but to conceal their joint venture in narcotic trading. It had a right to know from Roberta Dilts that she and Browne

had been involved in narcotic traffic on their own account. This would have supported the defense that Michael Browne, not appellant, had masterminded the conspiracy charged and that he was dealing for his own account. This, the Court made certain by its rulings that the jury never learned and thereby deprived appellant of his right to a fair trial.

POINT THREE

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY MISLEADING AND UNFAIR ARGUMENT BY THE PROSECUTOR IN HIS SUMMATION.

On summation, Assistant United States Attorney Davis unfairly argued that Michael Browne had no motive to testify falsely, since he had already been sentenced. (T. 400-1) This, of course was a patent falsehood. Browne had testified at the trial of William Meinecke. Were he to have changed his testimony for this trial, he would have faced a perjury indictment. Thus, he had motive to testify falsely to save himself, in view of the prior testimony he had given.

Mr. Davis further argued that witnesses other than Browne had inculpated appellant. (52A-53A) Mr. Davis did not identify them, for the simple reason that there were none. Indeed, Roberta Dilts testified exculpating appellant from any illegal participation. (50A-51A) Mr. Davis announced to the Court that he was not calling William Meinecke as a witness, because he would testify exculpating appellant. (46A-47A) This

was a patent effort at misleading the jury and where a case rests on the uncorroborated testimony of an admitted participant in the crime, the error cannot be deemed harmless.

Speaking of the obligations of a prosecutor, the Supreme Court stated that "while he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L. Ed. 2d 1314 (1934). The blows struck by the prosecutor in summation were "foul". They deprived appellant of a fair trial. In United States v. Curtiss, 330 F. 2d 278 (2nd Circ., 1964), it was held that argument on summation comparing defendant's unsworn statements made while representing himself, with sworn testimony of witnesses was unfair and the conviction was reversed. No less prejudicial error occurred in the case at bar.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL GRANTED.

Respectfully submitted,

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